IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 4764 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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AMINABIBI, D/O. ISMAIL PATEL & ANR

Versus

THE STATE OF GUJARAT & ANR

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Appearance :

MR MTM HAKIM for Applicants

MR KC SHAH APP for Opponent No.1 - STATE

MR VY TRIPATHI for Opponent No.2

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

Date : 19/01/2006

ORAL JUDGMENT

1.Heard learned advocate Mr.M.T.M.Hakim for the applicants, learned APP Mr.K.C.Shah for the opponent No.1 – State of Gujarat and learned advocate Mr.V.Y.Tripathi for the opponent No.2. Learned advocate for the applicants places on record copies of the rojkam in Criminal Misc. Application No.318 of 1995 which is taken on record.

2.The present applicant No.1 and her minor daughter preferred Criminal Misc. Application No.318 of 1995 in the Court of Chief Judicial Magistrate at Godhra under Section 127 of the Code of Criminal Procedure. It appears that though the application came to be registered on 1st August, 1995, proceedings continued for two years and ultimately, on 13th November, 1997, learned 8th Joint Judicial Magistrte (F.C.) at Godhra passed an order that neither applicants nor her advocate were present, when called out and hence the case was dismissed for default

for want of prosecution in absence of applicants.

3.The applicants preferred Criminal Revision Application No.105 of 2004 before the Court of Sessions at Panchmahal at Godhra against the said order passed by the 8th Joint Judicial Magistrate (F.C.) at Godhra, but the said Criminal Revision Application came to be dismissed vide judgment and order dated 30th December, 2004 delivered by the Sessions Judge, Panchmahal at Godhra and hence, this Criminal Misc. Application under Section 482 of the Code of Criminal Procedure.

4.Learned advocate for the applicants vehemently urged that the applicants being illiterate and very poor could not understand properly the Court proceedings and could not remain present before the learned Judicial Magistrate (F.C.). It was also submitted that the applicants engaged an advocate to represent them, who in turn, conveyed to them that the case would be

proceeded, when notices were served upon the opponents and at the time of her deposition, she would be required to remain present before the Court. Learned advocate for the applicants submitted that in Criminal Revision Application before the Court of Sessions, though a stand was taken that it was the duty of the Court concerned to serve the opponents and on that ground, the said Criminal Revision Application came to be dismissed, but the said ground is no more canvassed and advanced by him. It is submitted by the learned advocate for the applicants that as per the decision of this Court in the matter of **JAYESH RAMNIKLAL POPAT Vs. BHARTIBEN JAYESHBHAI POPAT & ORS.**, as reported in **1996 (2) G.L.R. 683**, at least, the applicant No.2 was minor at the relevant juncture, was entitled to sympathy of the Court. It was submitted that ultimately, it was found that the notices were served upon the opponents and, thereafter, the said Criminal

Misc. Application was dismissed for want of non-prosecution. It is submitted that in above view of the matter, taking sympathetic view, the order in question passed by the learned Judicial Magistrate (F.C.) be quashed and applicants be allowed to agitate Criminal Misc. Application No.318 of 1995.

5.As against that learned advocate for the opponent No.2 submitted that there is no provision in Code of Criminal Procedure for restoration of the application under Sections 127 or 125 of the Code of Criminal Procedure, when the same is dismissed for want of prosecution. It is further submitted that the learned advocate for the opponent filed an affidavit in Criminal Revision Application No.105 of 2004 before the Sessions Judge, Panchmahal that the applicant No.2 was major and, thereafter, only in this proceeding School Leaving Certificate etc. are produced by the present applicants to show that the applicant

No.2 was minor at the relevant juncture. Learned advocate for the opponent No.2 submitted that in any case, at present, the applicant No.2 is major and as such, she may file fresh application which is not barred. It is submitted that it was not the duty of the trial Court to serve notice upon the opponent – husband, but it was duty of the applicant to remain present before the Court and, therefore, learned Sessions Judge, Panchmahal rightly rejected the Criminal Revision Application of the present applicants. It is further submitted that the present applicant No.2 being major, the decision of this Court, in the matter of **JAYESH RAMNIKLAL POPAT** (Supra) would not be applicable to the facts of this case. It is, therefore, submitted to reject this application.

6. Going through the record with reference to the contentions raised, it appears that Criminal Misc. Application No.318 of 1995 prolonged for

about two years. Copy of the rojkam which is taken on record reveals that on 27th August, 1998, when case was fixed on board, notice to opponent – husband was duly served, but he was not present. Thereafter, four dates were fixed for recording of the evidence and neither applicants nor opponent remained present. Therefore, the order for dismissal came to be passed by the learned Judicial Magistrate (F.C.), Godhra on 13th November, 1997. Going through the judgment and order of learned Sessions Judge, Panchmahal at Godhra, it appears that the Criminal Revision Application of the present applicants came to be dismissed on two grounds, firstly because it was not duty of the Court to serve the opponents and secondly that the applicant No.2 had attained majority. Now, it clearly appears that the said Criminal Revision Application was agitated and defended on wrong assumption that the main application came to be dismissed by the

Judicial Magistrate (F.C.) because the applicants failed to serve the opponents. When the factual aspect was noticed through rojkam produced on record, it clearly reveals that the matter was fixed for inquiry after serving of notice to the opponent and for consecutive four dates, none remained present, hence learned Judicial Magistrate (F.C.) passed the order of dismissal of the application.

7. It cannot by any stretch of reasoning, be said that it is the duty of the Court and Court alone to serve the opponents under proceedings for maintenance as has been agitated by the applicants in the Revision Application before the Court of Sessions at Panchmahal. It becomes pious duty to the applicants concerned to assist the Court in serving otherside. Apart from that since the said ground is not further advanced, the matter is required to be decided and considered within the scope of the object of the proceedings. The facts necessary in this

respect, must also be taken into consideration. It is persistence and consistence stand of the applicants through out the Revision Application before the Court of Sessions and in this proceeding that she engaged an advocate to conduct the said proceedings before the trial Court and whenever she contacted her advocate, she was conveyed that the matter would be proceeded, when notices were served and her deposition would be necessary. Beside that she has also stated that on account of her occupation to look after her minor daughter, she could not frequently remain present before the trial Court. If these facts are considered along with the object of the provisions under Sections 125 and 127, it clearly appears that no fault could be found with the applicants in not remaining present before the trial Court as she had engaged an advocate to take care of the litigation. The fact that the applicant No.2 attended majority during proceedings of

Revision Application before the Court of Sessions at Panchmahal or thereafter, assumes no importance with reference to fact in issue. The fact remains that when application before the trial Court came to be filed, the applicant No.2 was minor and she was, still minor when the order of dismissal came to be passed. It is also true that there is no provision in Code of Criminal Procedure for dismissal of the application under Sections 125 and 127 or for restoring the same. Undoubtedly, the proceedings are of quasi civil nature and are required to be conducted, so far as possible by the procedure laid down for summons cases in the Code of Criminal Procedure. The question for consideration is not as to whether without any provisions, the trial Court rightly dismissed the application for that if dismissed, there is no provisions of restoration, but the question for consideration is whether while, exercising inherent powers

would it be justifiable to relegate the applicants at this juncture for filing fresh application under Section 127 of the Code of Criminal Procedure. In my humble view certainly, such a course would not advance cause of justice. While if she is allowed to continue the proceedings before the trial Court, in my view benevolent object of this social piece of legislation would be achieved consequently advancing the cause of justice. Therefore, without finding any fault with the trial Court or Court of Sessions, it would be in the interest of justice to quash the order passed by the learned Judicial Magistrate (F.C.) to dismiss the application for want of prosecution.

8. In the result, this application is allowed and order passed by the learned 8th Joint Judicial Magistrate (F.C.), Panchmahal at Godhra on 13th November, 1997 in Criminal Misc. Application No.318 of 1995 dismissing the same for want of

prosecution is quashed and set aside and consequently, the order passed by the Sessions Judge, Panchmahal at Godhra on 30th December, 2004 in Criminal Revision Application No.105 of 2004 is also quashed and set aside. Learned Judicial Magistrate (F.C.) is directed to proceed with Criminal Misc. Application No.318 of 1995, according to law after affording opportunity of hearing to both the parties. As per the rojkam, notice is served upon the opponent – husband and, therefore, the applicants as well as opponent – husband are directed to remain present before the trial Court in Criminal Misc. Application No.318 of 1995 on 30th January, 2006. Rule is made absolute to the above extent. D.S. Permitted.

[J. R. VORA,J.]

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